

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: FACEBOOK, INC. CONSUMER
PRIVACY USER PROFILE LITIGATION,

This document relates to:

ALL ACTIONS

CASE NO. 3:18-MD-02843-VC

**DECLARATION OF ALEXANDER H.
SOUTHWELL IN SUPPORT OF
FACEBOOK'S STATEMENT IN
SUPPORT OF PLAINTIFFS'
ADMINISTRATIVE MOTION TO
CONSIDER WHETHER ANOTHER
PARTY'S MATERIAL SHOULD BE
SEALED**

1 I, Alexander H. Southwell, hereby declare as follows:

2 1. I am an attorney licensed to practice law in the State of New York. I am a partner
3 with the law firm of Gibson, Dunn & Crutcher LLP. I submit this declaration in support of
4 Facebook's Statement In Support Plaintiffs' Administrative Motion To Consider Whether
5 Another Party's Material Should Be Sealed (Dkt. 873). I make this declaration on my own
6 knowledge, and I would testify to the matters stated herein under oath if called upon to do so.

7 2. Attached as **Exhibit A** is a true and correct **redacted** copy of Plaintiffs' Notice of
8 Motion, Motion, and Memorandum in Support of Motion for Sanctions.

9 3. Attached as **Exhibit B** is a true and correct **unreacted** copy of Plaintiffs' Notice of
10 Motion, Motion, and Memorandum in Support of Motion for Sanctions.

11 4. Attached as **Exhibit C** is a true and correct **redacted** copy of Plaintiffs' Exhibit 1.

12 5. Attached as **Exhibit D** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 1.

13 6. Attached as **Exhibit E** is a true and correct **redacted** copy of Plaintiffs' Exhibit 16.

14 7. Attached as **Exhibit F** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 16.

15 8. Attached as **Exhibit G** is a true and correct **redacted** copy of Plaintiffs' Exhibit 17.

16 9. Attached as **Exhibit H** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 17.

17 10. Attached as **Exhibit I** is a true and correct **redacted** copy of Plaintiffs' Exhibit 18.

18 11. Attached as **Exhibit J** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 18.

19 12. Attached as **Exhibit K** is a true and correct **redacted** copy of Plaintiffs' Exhibit 19.

20 13. Attached as **Exhibit L** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 19.

21 14. Attached as **Exhibit M** is a true and correct **redacted** copy of Plaintiffs' Exhibit 23.

22 15. Attached as **Exhibit N** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 23.

23 16. Attached as **Exhibit O** is a true and correct **redacted** copy of Plaintiffs' Exhibit 25.

24 17. Attached as **Exhibit P** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 25.

25 18. Attached as **Exhibit Q** is a true and correct **redacted** copy of Plaintiffs' Exhibit 26.

26 19. Attached as **Exhibit R** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 26.

27 20. Attached as **Exhibit S** is a true and correct **redacted** copy of Plaintiffs' Exhibit 27.

28 21. Attached as **Exhibit T** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 27.

22. Attached as **Exhibit U** is a true and correct **redacted** copy of Plaintiffs' Exhibit 31.
23. Attached as **Exhibit V** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 31.
24. Attached as **Exhibit W** is a true and correct **redacted** copy of Plaintiffs' Exhibit 32.
25. Attached as **Exhibit X** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 32.
26. Attached as **Exhibit Y** is a true and correct **redacted** copy of Plaintiffs' Exhibit 33.
27. Attached as **Exhibit Z** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 33.
28. Attached as **Exhibit AA** is a true and correct **redacted** copy of Plaintiffs' Exhibit 34.
29. Attached as **Exhibit AB** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 34.
30. Attached as **Exhibit AC** is a true and correct **redacted** copy of Plaintiffs' Exhibit 51.
31. Attached as **Exhibit AD** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 51.
32. Attached as **Exhibit AE** is a true and correct **redacted** copy of Plaintiffs' Exhibit 55.
33. Attached as **Exhibit AF** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 55.
34. Attached as **Exhibit AG** is a true and correct **redacted** copy of Plaintiffs' Exhibit 60.
35. Attached as **Exhibit AH** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 60.
36. Attached as **Exhibit AI** is a true and correct **redacted** copy of Plaintiffs' Exhibit 61.
37. Attached as **Exhibit AJ** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 61.
38. Attached as **Exhibit AK** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 63.

The previously filed version of this document is redacted and sealed entirely. See Dkt. 814 at 4359.

39. Attached as **Exhibit AL** is a true and correct **redacted** copy of Plaintiffs' Exhibit 64.

40. Attached as **Exhibit AM** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 64.

41. Attached as **Exhibit AN** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 65.

The previously filed version of this document is redacted and sealed entirely. See Dkt. 814 at 4343.

42. Attached as **Exhibit AO** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 66. Previously filed version of this document is redacted and sealed entirely. *See* Dkt. 804-3 at 0476.

43. Attached as **Exhibit AP** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 67.

44. Attached as **Exhibit AQ** is a true and correct **unreacted** copy of Plaintiffs' Exhibit 68.

1 45. Attached as **Exhibit AR** is a true and correct **redacted** copy of Plaintiffs' Corrected
2 Notice of Motion, Motion, and Memorandum in Support of Motion for Sanctions.

3 46. Attached as **Exhibit AS** is a true and correct **unreacted** copy of Plaintiffs' Corrected
4 Notice of Motion, Motion, and Memorandum in Support of Motion for Sanctions.

5 47. Facebook initiated the Application Developer Investigation ("ADI" or the
6 "Investigation") because, in the wake of the reporting of data misuse by Cambridge Analytica in
7 March 2018, Facebook anticipated that it would have to respond to known and expected legal
8 challenges in connection with applications and developers that may have had access to large amounts
9 of user data because they were active before Facebook placed additional, significant limitations on
10 the amount and type of data developers could request from users through the Facebook Platform
11 in 2014.

12 48. To this end, Facebook retained outside counsel (Gibson, Dunn & Crutcher LLP)
13 experienced with cybersecurity and data privacy internal investigations to design and direct a new
14 investigation (ADI) that could, among other things, gather the facts necessary for providing legal
15 advice to Facebook about litigation, compliance, regulatory inquiries, and other legal risks facing the
16 company resulting from potential data misuse and activities by third-party app developers operating
17 on the prior version of Facebook's platform.

18 49. I led the Gibson Dunn team engaged to develop and conduct the Investigation. I am a
19 former federal prosecutor and have more than two decades of experience with large-scale, corporate
20 investigations. The Gibson Dunn team worked with Facebook's in-house attorneys and members of
21 Facebook's Partnerships, Data Policy, and DevOps teams on the ADI. I and my team at Gibson
22 Dunn also led the recruitment and retention of technical experts and investigators for the ADI,
23 including two leading forensic consulting firms with expertise in assisting with technology-focused
24 internal investigations. These consulting experts operated as an extension of the Gibson Dunn team
25 to support our provision of legal advice to Facebook, and the investigators worked under the direction
26 of Gibson Dunn and Facebook Legal. The "ADI team," as used herein, is comprised of Gibson Dunn
27 lawyers and paralegals, our consulting experts, and Facebook in-house counsel and internal partners
28

1 including subject matter experts, all of whom operated at the direction of counsel. At its largest, the
2 ADI team consisted of over 300 members.

3 50. Gibson Dunn and in-house counsel needed to partner with the outside expert
4 consulting firms and Facebook personnel to effectively advise Facebook of legal risk. The ADI team
5 worked at the direction of counsel, relied on counsel's input and guidance, and played a necessary
6 role in facilitating legal advice by counsel and implementing that advice by the company. The ADI
7 was an iterative process through which ADI team members, including counsel and subject matter
8 experts, were able to learn as the investigation progressed. As such, documents initially drafted by
9 members of the ADI team were generally prepared by or at the direction of counsel, and counsel
10 edited or otherwise helped shape their contents to ensure they were serving the legal purpose for
11 which they were created.

12 51. The Investigation was highly complex and addressed millions of applications
13 operating before changes were made to Facebook's platform. There was no industry standard for
14 how to conduct such an investigation. Rather, under Gibson Dunn's and in-house counsel's
15 leadership, the ADI team devised and tailored the ADI's methods, protocols, and strategies to address
16 the specific risks posed by these legal challenges. These proprietary methods and techniques are
17 valuable to Facebook.

18 52. The methods, techniques, and strategies employed during the Investigation are highly
19 confidential. Indeed, Facebook has taken numerous substantial steps to maintain the confidentiality
20 of details regarding the Investigation. For example, details about the Investigation are disclosed to
21 Facebook employees only on a need-to-know basis. As a result, a limited number of Facebook
22 employees, counsel, and third-party experts have accessed this highly sensitive information.

23 53. The proposed redactions cover information that would reveal proprietary and highly
24 confidential aspects of the Investigation. Facebook continues to assert that the Investigation was also
25 privileged, and Facebook has produced ADI-related materials under compulsion over its assertions of
26 attorney-client privilege and work product protection. Public disclosure of portions of the very
27 information Facebook seeks to protect would cause Facebook to suffer irreparable harm by publicly
28 disclosing aspects of Facebook's legal Investigation that Facebook has diligently worked to keep

1 confidential and compromising Facebook's efforts to assert attorney-client privilege or work product
2 protection over these materials on appeal or in other actions.

3 54. Facebook asks the Court to permanently seal the names of two consulting expert firms
4 who assisted with the Investigation on a confidential basis, working at Gibson Dunn's direction. *See*
5 Pls.' Ex. 1 at 32–33; Pls.' Ex. 23 at 2; Pls.' Ex. 27 at 1–2; Pls.' Ex. 55 at 11. If these names were
6 disclosed publicly, competitors would have access to confidential information regarding Facebook's
7 business relationships with third-party experts. Public disclosure could undermine Facebook's and
8 Gibson Dunn's current and future relationships with third-party vendors and be used to cause
9 Facebook competitive harm. The Court has previously found good cause to seal this information.
10 *See* Dkts. 737, 764, 836, 837, 838, 839, 891.

11 55. Facebook also seeks to seal the identities of apps and developers that were
12 investigated by ADI. *See* Pls.' Mot. at 13; Pls.' Ex. 1 at 33, 38. If this information were publicly
13 disclosed, these non-party apps and developers could suffer reputational harm because members of
14 the public might infer that they had engaged in wrongdoing, when some apps were suspended for
15 non-cooperation with ADI. The Court has previously found good cause to seal this information. *See*
16 Dkts. 519, 838.

17 **ADI Investigative Reports**

18 56. Facebook asks the Court to seal two investigative reports generated by Facebook's
19 consulting experts during the Enhanced Examination phase of the Investigation, as well as excerpts of
20 investigative reports quoted in Plaintiffs' Motion. *See* Pls.' Mot. at 13; Pls.' Exs. 67, 68. In the
21 Enhanced Examination phase, apps were selected for further review by counsel through proprietary
22 risk-based approaches based on counsel's assessment of where and how the greatest legal risk to the
23 company might arise to provide legal advice to Facebook regarding potential risks and active and
24 potential litigation. Once an app or developer had been identified for further review based on criteria
25 that my team had devised, Gibson Dunn and in-house counsel directed our consulting experts to
26 conduct intensive background and technical investigations, collect and compile specific evidence that
27 counsel believed particularly salient to their legal analyses, and report their findings to counsel. Each
28 report for a single developer could include extensive technical and other details and these reports

1 were specifically tailored by counsel, in substance and format, so that counsel could evaluate the
2 potential for data misuse and associated legal risks. Reports varied tremendously based on counsel's
3 instructions and what counsel determined was needed to provide legal advice. Although the Court
4 has ordered Facebook to produce investigative reports from ADI, Facebook continues to assert that
5 these reports are attorney-client privileged and work product and has produced these reports under
6 compulsion.

7 57. Enhanced Examination also included application of a proprietary model (called the
8 Risk-Prioritization Formula) developed under the guidance and with the advice of counsel that
9 assisted in assessing the risks related to access to data, and the associated legal risks to Facebook,
10 based in part on the permissions granted to apps and the number of users that authorized specific
11 permissions. The Risk-Prioritization Formula was used exclusively in the ADI to prioritize apps for
12 review during the Enhanced Examination phase.

13 58. The investigative reports attached as Plaintiffs' Exhibits 67 and 68 were created in the
14 Enhanced Examination phase at the direction of counsel to assist counsel in the provision of legal
15 advice and contain or reveal the mental impressions and advice of counsel. Facebook has produced
16 the investigative reports under compulsion, over its privilege and work product objections. As noted
17 above, Gibson Dunn worked directly with the rest of the ADI team to design ADI-specific
18 investigation reports to contain information relevant to counsel's evaluation of the potential for data
19 misuse and associated legal risk.

20 59. To facilitate our attorney review at scale, we instructed the ADI team regarding the
21 criteria and information that were important to us in rendering our opinion on legal risk, and
22 requested that they, based on these attorney-selected criteria, include preliminary recommendations in
23 their reports to facilitate Gibson Dunn's legal advice about the risk of data misuse. Therefore, the
24 topics of investigation in each report—even including analyses of publicly-available information—
25 reveal the criteria and information that were important to the ADI team's innovative and proprietary
26 analyses.

27 60. Although counsel may not have drafted each of these documents directly, the
28 documents created as part of the Enhanced Examination phase were created at the direction of

1 counsel, reflect attorney advice and mental impressions regarding the evidence counsel deemed
2 important in rendering legal advice, and were directly used by counsel to provide legal advice to
3 Facebook.

4 61. Each investigative report is focused on a specific developer or set of apps investigated
5 by ADI and is replete with sensitive business information about third parties. The investigative
6 reports were intended to identify potential concerns about third-parties for counsel to investigate. In
7 some cases, the concerns identified were disproven based on additional evidence gathered by the ADI
8 team. Disclosure of any portion of these reports would reveal confidential and highly sensitive
9 information about third parties and—in some cases—cause public disclosure of information that has
10 not been subject to confirmation or verification. The reports should be sealed to protect the rights of
11 non-parties.

12 62. Public disclosure of the investigative reports could also create security risks. The
13 Investigation was designed to identify applications that may have misused data before Facebook
14 implemented additional platform protections. Every portion of the investigative reports reveals what
15 information counsel deemed relevant to assessing the potential for data misuse, as well as the tools
16 and capabilities of consulting experts in investigating that information. Data misuse and other abuse
17 practices by app developers can be adversarial in nature, meaning that bad actors commonly attempt
18 to evade technological, investigative and enforcement mechanisms designed to detect and disrupt
19 abuse. As a result, Facebook has strictly maintained the confidentiality of ADI details to ensure bad
20 actors cannot use that information in attempts to evade the additional restrictions on data access that
21 Facebook has enacted. If publicly disclosed, this sensitive information could make Facebook's
22 enforcement efforts less effective, which would cause harm to Facebook and its users.

23 63. The investigative reports also contain commercially sensitive information regarding
24 Facebook's technical infrastructure and operations regarding how Facebook stores data. In
25 investigating the potential for data misuse, reports include details about apps accessing Facebook
26 through API calls, consistent with users' privacy selections. Facebook's methods for protecting user
27 privacy and storing user data are valuable. If information about Facebook's API call log system were

publicly disclosed, competitors could potentially use it to improve their own competing methods for managing high volumes of data from interactions with large numbers of third parties.

64. The investigative reports also are replete with confidential information about the Investigation’s novel methods, processes, and strategies designed and developed by counsel in anticipation of litigation. Public disclosure of any portion of the reports would reveal highly sensitive information, such as (i) the identities of the apps and developers that were investigated during the Investigation, (ii) the information that counsel directed its consulting experts to investigate for each app or developer, (iii) the capabilities of the consulting experts in conducting their investigation, or (iv) the Investigation’s risk assessment for each app. Public disclosure of the Investigation’s targets, strategies, methods, and capabilities would allow Facebook’s competitors to copy these proprietary, innovative methods and techniques that Facebook and its counsel developed, which would cause Facebook competitive harm.

65. For these reasons, Facebook's proposed redactions are "Confidential" under the Protective Order and protected from public disclosure by Federal Rule of Civil Procedure 26(c).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 1, 2022 in New York, New York.

Alexander H. Southwell